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POLICE MISCONDUCT – A PLAINTIFF'S POINT OF VIEW II

John R. Williams*

MR. WILLIAMS:

Picking up where Fred Brewington left off,¹ the typical police misconduct plaintiff is someone who is going through the criminal justice system on the right side of the “v” and is moving over to the left side of the “v” for the civil case. One of the points that Fred asked me to address briefly is that which involves a successfully suppressed statement in a criminal prosecution that has ultimately been resolved favorably for the accused.¹ What can be done about that? That answer can be found in the 1994 Second Circuit case of *Weaver v. Brenner*.²

There is a line of cases starting with a decision by Judge Trott, a supposedly very conservative jurist in the Ninth Circuit, that hold that illegal police interrogation procedures themselves can be the subject of Section 1983 litigation.³ It is not just the failure to give a *Miranda* warning,⁴ that alone, as the *Weaver* court points out in a

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¹ N.Y. CRIM. PROC. LAW § 710.60 (McKinney's 1995). This section provides in pertinent part:

A motion to suppress evidence made before trial must be in writing and upon reasonable notice to the people and with opportunity to be heard. The motion papers must state the ground or grounds of the motion and must contain sworn allegations of fact, whether the defendant or of another person or persons, supporting such grounds. Such allegations may be based upon personal knowledge of the deponent or upon information and belief, provided that in the latter event the sources of such information and the grounds for such belief are stated.

Id.

² 40 F.3d 527 (2d Cir. 1994).

³ *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992) (holding plaintiff's allegation that police had coerced him into making incriminating statements while in custody stated a cause of action under 42 U.S.C. § 1983 despite fact that statements were not ultimately used at trial).

⁴ See *Miranda v. Arizona*, 384 U.S. 436 (1966) The Court held that “prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that

very extensive and thoughtful analysis,⁵ will not cut it. But when more than that is done, when the person's constitutional rights are actually violated and produce some injury as a result, that can be actionable.⁶

One of the important issues that face criminal defense lawyers when they are laying the groundwork in the criminal case for their subsequent Section 1983 action is the whole business of obtaining a "favorable" outcome because the overwhelming majority of criminal prosecutions, including those that are resolved favorably to the accused, do not go to trial. Prosecutors, most of whom unfortunately see their mission as covering for the cops, are very sensitive to this aspect. One of the things they hate is a phone call from a cop they see every day saying, "What the hell did you do with case such and so? I just got served with a writ today." They do not like to be on the defensive, so they find themselves in the position of trying to cover for the cops.⁷ Illegal though it may be, that is the practice.

So what is a favorable outcome? This is especially important in a malicious prosecution action. Malicious prosecution actions are a potentially valuable tool for the plaintiff's lawyer. Malicious prosecution is, in effect, a constitutionalization of the old common law tort of malicious prosecution, which has now been universally accepted and has been approved by the Supreme Court.⁸ It is analyzed under the Fourth Amendment,⁹ and it is different from

he has a right to the presence of an attorney, either retained or appointed." *Id.* at 444.

⁵ *Weaver v. Brenner*, 40 F.3d 527, 534 (2nd Cir. 1994).

⁶ *See Cooper v. Dupnik*, 963 F.2d at 1243-44 (9th Cir. 1992).

⁷ *See e.g.* David Kocieniewski, *Police Prosecutor Claims Cover Up in Beating Case*, NEW YORK TIMES, April 9, 1998 at A25. *See also*, Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFFALO L. REV. 1275, 1338 (noting that "it is often far easier to [settle and to] ask the taxpayers to pay and pay than to take the politically risky position that the police department has to change its wrongful practices").

⁸ *See Dombrowski v. Pfister*, 380 U.S. 479, 497-98 (1965).

⁹ U.S. CONST. amend IV. This amendment provides:

The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

false arrest¹⁰ because it takes you beyond the point of arraignment.¹¹

There are Second Circuit cases which have held that the damages from a false arrest may very well stop at the point where there is an independent probable cause determination either by a grand jury or by a magistrate.¹² The way to carry damages beyond that is by using a malicious prosecution claim. This is how one would collect damages for the inconvenience, humiliation and expense of a criminal trial that ends in an acquittal.

Malicious prosecution is based upon a false police report or false police testimony before the grand jury that initiates the prosecution, thus carrying one beyond the arrest stage, and it is again, a Fourth Amendment analysis.¹³ But the courts in constitutionalizing malicious prosecution have incorporated all of the traditional elements of that tort from state law.¹⁴

There are, therefore, some subtle variances in the Fourth Amendment law of malicious prosecution under § 1983 from state to state.¹⁵ But one of the universal requirements is that the underlying criminal prosecution be terminated in a manner that is favorable to the formerly accused, now plaintiff.¹⁶ The question is

Id.

¹⁰ BLACK'S LAW DICTIONARY 600 (6th ed. 1990) (defining "a species of false imprisonment, consisting of the detention of a person without his or her consent and without lawful authority").

¹¹ See *Hygh v. Jacobs*, 961 F.2d 359, 366 (2d Cir. 1992) (stating that "[New York] law provides that damages may be awarded for false arrest only from the period from initial custody until arraignment").

¹² See *Bernard v. United States*, 25 F.3d 98, 104 (2d Cir. 1994) (holding that the district court properly granted summary judgment when there was sufficient evidence to establish probable cause).

¹³ See *Eugene v. Alief Indep. Sch. Dist.*, 65 F.3d 1299, 1303-04 (5th Cir. 1995) (permitting a Section 1983 malicious prosecution claim based on the Fourth rather than the Fourteenth amendment).

¹⁴ See, e.g., *Reed v. City of Chicago*, 77 F.3d 1049, 1051 (7th Cir. 1996); *Taylor v. Meachem*, 82 F.3d 1556, 1561 (10th Cir. 1996).

¹⁵ See *Taylor v. Meachem*, 82 F.3d at 1560-61 (comparing elements required to state a cause of action for malicious prosecution under various states' common law with the elements necessary to establish a Section 1983 malicious prosecution claim).

¹⁶ See RESTATEMENT (SECOND) OF TORTS § 658 (1977). This section provides in pertinent part: "To subject a person to liability for malicious prosecution, the criminal proceedings must have been terminated in favor of the

“what does that mean?” Depending upon the state, that may be a more or less difficult thing to prove.

For example, in Connecticut it takes virtually nothing to prove that.¹⁷ Anything that ends a criminal prosecution is considered to be favorable.¹⁸ But those who practice in New York know that it is a lot tougher. In New York an adjournment in contemplation of dismissal¹⁹ holds that simply an end of the prosecution is not sufficiently favorable.²⁰ The *Singleton* case in the Second Circuit incorporates the New York law on this point.²¹

It is very important from the criminal defense perspective to make sure that the case ends. If the ending is without a trial as we say in Connecticut or it is ending with a dismissal or something other than a full jury verdict, it is important that it meet the test in the particular jurisdiction of what constitutes a favorable termination.²² Therefore, from the criminal defense lawyer's point of view it is absolutely crucial that he knows what that standard is for the jurisdiction where he practices.

There is not a week that goes by that I do not get a call from somebody who was defended by another lawyer or some defense lawyer saying, “Well, this is the way the case ended” or “This is the way the case is about to end.” That will be good enough to

accused.” *Id.*; see also *Brumett v. Cambele*, 946 F.2d 1178, 1183 (5th Cir. 1991).

¹⁷ See *DeLaurentis v. City of New Haven*, 597 A.2d 807, 820-21 (Conn. 1991).

¹⁸ See, e.g., *Grasso v. Newbury*, No. 361369, 1990 WL 271096, at *2 (Conn. Super. Ct., Apr. 17, 1990) (holding that a dismissal pursuant to an accelerated rehabilitation statute was sufficiently favorable to accused to support state law action for malicious prosecution).

¹⁹ N.Y. CRIM. PROC. LAW § 170.55 (McKinney 1999).

²⁰ *Singleton v. City of New York*, 632 F.2d 185, 193 (2d Cir. 1980).

²¹ *Id.*; see also, *Russell v. Smith*, 68 F.3d 33, 36 (2d Cir. 1995) (noting that an acquittal is the most obvious example of a favorable terminations); *Hygh v. Jacobs*, 961 F.2d 359, 368 (2d Cir. 1992) (finding that a ‘dismissal in the interest of justice’ “leaves the question of guilt or innocence unanswered”); *Ryan v. N.Y. Tel. Co.*, 62 N.Y.2d 494, 504-05, 467 N.E.2d 487, 493, 478 N.Y.S.2d 823, 829 (1984) (stating that a “dismissal in the interest of justice is neither an acquittal of the charges nor any determination of the merits”); *Kramer v. Herrera*, 576 N.Y.S.2d 736, 737 (4th Dep’t 1991) (stating that a “dismissal of a criminal charge in the interest of justice is not a termination of the proceeding in favor of the accused and is insufficient to sustain a cause of action to recover damages for malicious prosecution”).

²² See *Janetka v. Dabe*, 892 F.2d 187, 189 (2d Cir. 1989).

sue, won't it?" I always have to say, "No, it's not good enough." Then the attorney says, "Well, geez, otherwise I'm going to have to try the case." So, I tell them, "Well, that's what you're paid for." An attorney has to be aware of these problems or he is inviting a malpractice suit somewhere down the road, so he has to be sensitive to that.

One of the questions that we are often asked when we talk about the interface between criminal defense and representing plaintiffs in these cases is, "How do you deal with the unsavory client?" One practitioner stated, "Well, I just don't take them." But the truth is almost all of them are unsavory. Our task as lawyers is to apply the Midas touch to our clients.²³

I am just absolutely convinced that there is no client who cannot be sold to a jury with the appropriate combination of skill, inspiration and tremendously good luck. This, of course, is what is fun about this business, right?

Just as an example, I happen to be blessed by having somehow enticed some young geniuses to my firm. One of those geniuses is my partner who, without telling me, took on the case of a man who was serving life without parole, having been spared the death penalty in Connecticut after a horrendous rape and murder of a young teenage girl. While serving his sentence he decided that he did not really like the environment and he wanted to get out. In order to effectuate his escape, he stabbed a female guard, stripped her of her uniform, put it on and attempted to make a getaway disguised as a female guard. He got caught before he made it to the outer wall and the guards who caught him, having taken him into custody, took him into a back room and knocked him around a little bit. He suffered a deviated septum and some bumps and bruises.

My partner took that case on a claim of guard brutality. This was in federal court, but the judge was a relatively young judge and allowed a little bit of lawyer participation in the voir dire. So the judge allowed him to take about ten minutes to talk to the jurors. He said, "I want to tell you about my client." He proceeded to paint the worst, most disgusting picture imaginable.

²³ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-19 (1995) (stating that an attorney has a duty to zealously advocate the facts and law of his client's case).

He said everything he could think of that the defense lawyer would say. Then he said, "Now all of you who think that my client deserved what he got, raise your hand." Then to those with their hands raised he said, "All of you are out." He got two million dollars, which was recently reduced about three weeks ago to a mere \$365,000. But I said, "That's \$365,000 more than anybody else could get". I also said, "it's yet to play in a Second Circuit courtroom near you."

But the point is this, it is kind of like jujitsu, which is to take your opponent's strength and use it against him. Everything can be sold. Every case of police misconduct can be considered outrageous. Every injury can be a big injury even if it is only an emotional distress injury. All it takes is imagination and, of course, luck.

There are going to be times when one may be able to provide damage control early on. One of these young geniuses in my office unfortunately dealt with this in his first trial and everything since then has been downhill, sort of like Norman Mailer, with *The Naked and the Dead*.²⁴ What do you do for a second act?

There is a case of a guy arrested and charged with murder and incarcerated for two weeks on plainly fabricated police evidence before the truth came out whereby he was released. Unfortunately by the time our Section 1983 case came to trial, he had been charged in another murder of which he was ultimately convicted, so he was prosecuting this case from prison. The question was whether the jury would find out about his incarceration.

Therefore, before the jury was selected, he filed a motion in limine so that he could know whether this would be a problem he would have to deal with or something that he would not have to worry about.²⁵ As luck would have it, he did not have to worry about it at all and the genius got a million-dollar verdict for this guy for the two weeks in jail.²⁶ The U.S. Supreme Court just

²⁴ NORMAN MAILER, *THE NAKED AND THE DEAD* (Rinehart, 1947) (typifying the fact that Mr. Mailer did not aspire beyond this first book that he wrote at the age of 25).

²⁵ BLACK'S LAW DICTIONARY 1013 (6th ed. 1990) (defining a motion in limine as a "pretrial motion requesting court to prohibit opposing counsel from referring to or offering evidence on matters so highly prejudicial to moving party that curative instructions cannot prevent predispositional effect on jury").

²⁶ *Ham v. Greene*, 248 Conn. 508, 537, 729 A.2d 740, 757 (1999).

denied certiorari last week.²⁷ I have never had a verdict this big, by the way. I mean, I am not blowing my own horn, but I am living off of these young guys.

So what do we learn from that? What we learn from that is to file your suppression motions early on in the process,²⁸ just like an attorney would in a criminal case. In a civil context, file the motions in limine,²⁹ find out what the parameters are, and then once the attorney knows what the problems are, he should just deal with them in a straightforward way. If a jury believes that he is candid, and not playing games with them that the attorney sees things just the same way they do, that he is not enamored with his client that he is not a typical slippery, slimy lawyer who is trying to cover up the truth and pull the wool over their eyes, then they develop some sense of trust in him as a human being and will respond appropriately. The average citizen under the appropriate circumstances will do the right thing, and the right thing, of course as we all know, means returning an appropriate and hopefully substantial award to our client.

A follow-up on the area that Barry Scheck was discussing is the problem of the criminal prosecution of the deviant police officer. Another is the problem of the police witness who comes forward. I think that this is an area which plaintiff's lawyers will want to explore. Providing the appropriate representation to those police officers that have the courage to come forward is a tremendous and largely untapped area of § 1983 work.

My one experience has been in the case called *Dobosz v. Walsh*.³⁰ This case involved a police officer who just happened to be the first officer on the scene after a cop in Bridgeport killed a kid running away from a stolen car with a bullet in the back of the

²⁷ *Id.*, cert denied sub nom. *Greene v. Ham*, 120 S. Ct. 326 (1999).

²⁸ BLACK'S LAW DICTIONARY 1014 (6th ed. 1990) (defining a motion to suppress as a "device used to eliminate from the trial of a criminal case evidence which has been secured illegally, generally in violation of the Fourth Amendment (search and seizure), the Fifth Amendment (privilege against self incrimination), or the Sixth Amendment (right to assistance of counsel, right of confrontation, etc.), of the U.S. Constitution").

²⁹ See *supra* text accompanying note 28.

³⁰ See *Dobosz v. Walsh*, 892 F.2d 1135 (2d Cir. 1989) (concerning the appeal by the Superintendent Walsh denying his motion for summary judgment on grounds of official immunity).

head.³¹ Officer Dobosz, arrived on the scene and was almost immediately dispatched elsewhere by the second officer, who happened to be a sergeant arriving on the scene. The dispatch was obviously to get Dobosz out of the way while the sergeant and the perpetrator got the story straight.³²

When Officer Dobosz returned, he noticed something that had not been there before, a couple of knives near the body of the young kid.³³ He kept this to himself for about a year and then he went to the FBI with the story.³⁴ This led to an unsuccessful criminal prosecution³⁵ and also led to an unsuccessful civil suit.³⁶ The minute that the cop involved was acquitted of the criminal trial, Superintendent Walsh of the Bridgeport Police Department suspended Officer Dobosz without pay and instituted termination proceedings on the grounds that he testified falsely at the criminal trial.³⁷ Because the perpetrator was acquitted, the thinking went that it proved Officer Dobosz was a perjurer and that the Bridgeport Police Department could not have any perjurers in its police department.

Meanwhile, shots were fired into his house at night,³⁸ a bullet lodged over the bed of his young son,³⁹ decapitated rats on the front lawn,⁴⁰ the whole nine yards, while the superintendent of police refused to provide police protection. As a result, the officer came to me. We sued the superintendent of police for all of this because these things would not have happened had it not been for the fact that the police protection was withdrawn.⁴¹ The verdict in that case was a lot more rewarding than the verdict in a lot of the other section 1983 cases that one sees.

I think as lawyers we need to keep in mind that part of our mission is to encourage these whistleblowers that are going to help

³¹ See *Fernandez v. Fitzgerald*, 711 F.2d 485, 486 (2d Cir. 1983).

³² *Dobosz*, 892 F.2d at 1137.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Fitzgerald*, 711 F.2d at 486 (2d Cir 1983).

³⁷ *Dobosz*, 892 F.2d at 1138.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

tomorrow's victims. One way we do that is by providing them with the same kind of representation that we provide to the other victims of this sort of misconduct. It is a real 'us' against 'them' situation and I do think that despite all the kidding around about the money to be made there, it is, in fact, a major public service.

JUDGE PRATT: John, thank you very much.

